No. 78-304

In the Supreme Court of the United States

OCTOBER TERM, 1978

AHMED BEN ALARSHI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

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AUTHORITIES CITED

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The petitioner, Ahmed Ben Alarshi, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, First Division, entered on February 6, 1978.

OPINION BELOW

The opinion of the Appellate Court of Illinois affirming petitioner's conviction was filed on February 6, 1978 and is reported as *People of the State of Illinois* v. *Alarshi*, 57 Ill.App.3d 464, 373 N.E.2d 516 (1978). The petitioner

sought, pursuant to Illinois Supreme Court Rules, a petition for leave to appeal to the Illinois Supreme Court. The order of the Illinois Supreme Court denying discretionary review was entered on May 26, 1978. The mandate calling for petitioner to be remanded to custody has been stayed pending disposition of this petition. Copies of the above-mentioned opinion and the order denying the petition for leave to appeal to the Illinois Supreme Court are appended to this Petition (Grp. A, 1-7; App. B, *infra*).

JURISDICTION

The opinion of the Appellate Court of Illinois was entered on February 6, 1978. Petitioner's timely petition for discretionary review in the Supreme Court of Illinois was denied on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). This petition has been filed within 90 days of the final decision from the highest Court in the State of Illinois (Appendix B, *infra*). In accordance with Rule 22(1) of this Court this petition is being filed within 90 days of the entry of the denial of discretionary review by the Illinois Supreme Court (App. B, *infra*). The mandate staying the execution of the sentence was stayed on July 17, 1978 by a Justice of the Illinois Appellate Court pending disposition of the instant petition (App. E, *infra*).

QUESTIONS PRESENTED

1. Whether the Sixth Amendments right of an accused to "confrontation" was violated where the trial jury . . . was allowed to hear (over strenuous objection) the *testimony* of a non-appearing eye-witness, through the lips of an unsworn prosecutor under the guise of impeachment? Stated otherwise, does this case fall within the parameters

of confrontation violation as set forth by this Court in *Douglas* v. *Alabama*, 380 U.S. 415 (1965)?

(a) Was the failure to give a "limiting instruction" prejudicial error where the proffered instruction involved the *testimony* (?) of the non-trial eye-witness?

2. Whether, in combination, the "limitation" by the trial court of petitioner's closing argument (as relating to the non-trial eye-witness) and the grossly improper closing argument of the prosecution combined to deny the petitioner his constitutional protection to a fair and impartial jury trial?[1]

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendments V, VI, XIV.

Statutes and Illinois Pattern Jury Instruction

Illinois Rev. Stat. Ch. 38 §12-4 (1973).

Illinois Pattern Jury Instruction, §3.11 (Appendix "C", *infra*).

STATEMENT OF THE CASE

(A)

June 13, 1974

A saloon. Go-go dancers. The P.L.O. These are the ingredients, which combined, to produce the event, indictment, trial and conviction.

On and prior to June 13, 1974 the petitioner was the lessee-manager of a Chicago go-go joint (Tr. 313). On the night in question he and others were in the saloon when

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[1] Cf., *Taylor* v. *Kentucky*, ... U.S. ....., 98 S.Ct. 1930 at 1934, n. 11 and 1936 n. 14. In *Taylor* prosecutorial misconduct during closing argument was not raised as an issue (id. at 1936, n. 14).

the victim entered (Tr. 305; 330-334). According to the version of events supplied by the victim there was a disagreement, and absent any provocation, the petitioner took a handgun and shot the victim (Tr. 219, 220). According to the petitioner, he not only did not have a handgun, but he did not shoot the victim (Tr. 307-310; 322-323). The petitioner claimed at trial that the victim was selling P.L.O. sponsored tickets (Tr. 303-305). Further, on the night of the shooting, the petitioner paid the victim $10.00 for one of the tickets earlier taken by the petitioner from the victim (Tr. 303-305).

Naturally, an added ingredient is the presence at the shooting scene of the inevitable "go-go" dancers (Tr. 131-137). After the event (the shooting) a joint statement of the two (2) go-go dancers was taken by a Chicago police officer (Tr. 176-178). No gun was recovered (Tr. 173). In November, 1974 the petitioner was charged in a two (2) count indictment alleging that he committed the offense of aggravated battery in violation of Ill.Rev.Stat., Ch. 38, §12-4 (Ct. 1) and aggravated battery with a deadly weapon (Ct. 2).[2]

(B)

The Trial

(Jury)

The victim testified that the petitioner shot him (Tr. 218-220). The shooting may have had something to do with

[2] In pertinent part, the statute under which petitioner was charged reads as follows:

> 12-4. § 12-4. *Aggravated Battery.*) (a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.
>
> (b) A person who, in committing a battery either:
>
> (1) Uses a deadly weapon; * * *

a problem as between the petitioner and one of the go-go dancers (Tr. 210-212, victim's version). No question is or was raised as to the simple underlying fact that the victim was shot in the saloon on June 13, 1974. Nor was any question raised about the fact that he spent time in the hospital and suffered certain injuries and later filed a substantial civil law suit against the petitioner and others (Tr. 249-250).

During the trial one of the go-go dancers testified for the prosecution. The other was *apparently* unavailable for trial. Various inconsistencies were the subject of cross-examination. An example is (was) whether there were one or two (2) gun shots (Tr. 128). The "joint statement" given to the police by the go-go dancers, after the event, was kept from the trial jury, *albeit* they requested same and the defense urged that the statement be given the trial jury during their deliberations (Tr. 501-506). The importance of the joint statement and its "TRIAL-USE" is the *sine qua non* of this petition.

Ms. Jean Watson (a former go-go dancer) testified for the prosecution. In pertinent part, she testified that both she and Cathy Green were working on the night in question at the saloon (Tr. 118). She testified that the petitioner and a blond woman had an argument (Tr. 117-118). At about 11:00 p.m. the victim entered the saloon (Tr. 118-119). Ms. Watson heard two (2) gun shots about 10 minutes apart (Tr. 120). Ms. Watson (according to her trial testimony) saw the petitioner shoot the victim (Tr. 121). This was the second gun shot Ms. Watson heard (Tr. 121-22). According to Ms. Watson's trial testimony (direct examination) after the shooting the petitioner had a gun in his hand (Tr. 122). Shortly thereafter the police arrived and she gave the police a written statement as to

what happened (Tr. 123). The petitioner, represented by the Cook County Public Defender, then cross-examined this witness. Under cross examination she agreed that she had declined to be interviewed by defense counsel and that she had known the victim prior to the date of the shooting (Tr. 124-126). During the further cross-examination of *Ms. Watson* the *joint statement* given to the police shortly after the shooting is introduced (Tr. 129).[3] Ms. Watson agrees that there is nothing in the statement about any shot being fired prior to the time the victim is shot (Tr. 129-30). The mysterious blond haired girl who was in the bar and talking to the petitioner prior to the shooting had been seen by this Witness many times. In fact, the blond haired girl (the missing mystery lady) actually worked in the same go-go saloon (Tr. 131-32).[4] After the shooting the blond haired lady left the tavern (Tr. 135, 136). Further cross-examination revealed that the *joint statement* as between Ms. Watson and Ms. Green[5] was signed by both of them and, to the best of the knowledge of this witness was accurate (Tr. 142, 154-165). At trial Ms. Watson testified she did not know whether the petitioner called the police although in the statement given to the police shortly after the event she claims the petitioner called the police (Tr. 142-143). The statement further shows that the petitioner did not have a weapon in his hand shortly after the shooting, although her trial

[3] Marked during Trial as Defense Exhibit #1 for identification. This *joint statement* is reproduced in the trial record at R. 15 . . . and is Appendix "D" to this Petition.

[4] The "blond haired girl" was not available at the time of trial. Thus, there was two (2) missing eye-witnesses.

[5] Likewise, a non-trial witness.

testimony is to the contrary (Tr. 143 vs. 121). Ms. Watson made no effort to assist the victim after the shooting (Tr. 145).[6]

During the re-direct examination, the prosecution commences to review the "Joint Statement" (Tr. 154-155). The prosecution brings out that the joint statement carries with it "Q" meaning question and "W" meaning Ms. Watson and "G" meaning Ms. Green.[7]

Over objection, the prosecution, while attempting to rehabilitate Ms. Watson read portions of the statement to the jury, *haec verba*. Further, over objection, the *prosecution* is allowed to read the following to the trial jury:

> "Q. Now, I would ask you to examine the answer to that fourth question and tell me what letter precedes the answer to the fourth question?
> A. G.
> Q. G. Now, Ms. Watson, I would ask you if you recall Investigator Phelan asking this question and this answer preceded on Defendant's Exhibit No. 1, by the letter G.
> Do you understand the question so far?
> I am asking you if you heard Phelan with the man, with the gray hair asking this question to Cathy Green, if you recall Cathy Green's answer?
> A. I understand.
> Q. What happened then, *the answer is preceded by a G, El reached under the bar and I saw him reach out with an object in his hand and I heard a loud noise and saw Freddie fall down to the floor. El then ran out of the bar to the front door and he stepped out and fired some shots outside.*

[6] In closing argument the prosecution argued that the petitioner made no effort to assist the victim following the shooting (Tr. 432). The defense case was clearly to the contrary (Tr. 332-333).

[7] Once again, we respectfully remind this Court that Ms. Green did not testify at this trial.

There were about four other people in the place who ran out, then El ran to a back room, walked in, returned from the room and called the police.

Do you recall Cathy Green making that statement to Investigator Phelan?[8]

A. Yes, she did.

Q. Now, Mr. Thompson pointed out this following question, at the next to last, on this, Defendant's Exhibit No. 2.

Question: Each of you have responded to a part of this statement.

Do each of you agree that the account given by the other is accurate?

The answer is preceded by a W, and it is "Yes."

Answer: (Preceded by a G for Ms. Green) Yes.

Do you recall that sequence of events?

A. Yes, sir.

Q. So, to your knowledge at the time this statement was given everything in here was true, is that correct?

A. Yes, sir.

Q. Now, as long as you have known Cathy Green, have you ever known her to lie to you?

A. No.

Q. So when she said something was true, did you believe that that was accurate?

A. I had no reason not to. (Tr. 162-4)[9]

The re-direct examination of Ms. Watson indicates that she has no personal knowledge of that which *Ms. Green* told the police but she believed Ms. Green (Tr. 164-165).

A prosecution witness was Inv. Phelan of the Chicago Police Department (Tr. 167). On June 13, 1974 he inves-

[8] Throughout the trial the petitioner was referred to as "EL".

[9] This line of questioning was the subject of specific objection; same being overruled by the trial judge (Tr. 157-60).

tigated this incident and, inter alia, spoke to the petitioner. He questioned the petitioner and the petitioner told him that:

> A. He said that he didn't know.
>
> He said that he had been tending bar and that a friend of this man who was shot was walking towards the front door when the front door was opened and a shot rang out from outside and he saw Mr. De Mellow fall to the floor. (Tr. 171)

Investigator Phelan, as part of his investigation not only interviewed Ms. Watson and Ms. Green but two men who were at the saloon during the investigation.[10] Inv. Phelan spoke to the victim at the hospital on the same morning and the victim *did not identify the petitioner as the shooter* (Tr. 179-80). The investigation revealed no handgun at the saloon and that as far as this investigator was able to determine only one shot had been fired in the tavern (Tr. 182).

The victim, Freddie DeMellow (a/k/a Eloeuir Fuad) testified that he was visiting the saloon on the night in question at the request of the petitioner. According to DeMellow (the victim) he would assist, from time to time, the petitioner with translations from Arabic to English (Tr. 205). DeMellow testified he was at the tavern because the petitioner had requested that he go there to translate some papers from English (Tr. 207). Once at the saloon petitioner served the victim a drink (Tr. 211) and then he heard the petitioner state something to the effect that he had an account to settle with a woman who

[10] Messrs. Mekler and Weiland (Tr. 172). Both Mekler and Weiland testified for the defense.

was in the bar (Tr. 211-212). He had this conversation with the petitioner in Arabic. After a short period of time the petitioner pulled out a gun and fired a shot into the ground stating something about "the Fourth of July" (Tr. 214). About 20 to 25 minutes passed during which time DeMellow both called a cab for himself (??) and saw the mysterious blond lady standing near the bar (Tr. 217). Thereafter a horn honked from outside and the blond lady took off. At this point petitioner had a gun (Tr. 218). As the blond girl (heretofore described as the mystery lady) ran by the victim he said good night to her and he was shot by the petitioner (Tr. 219-20). The post-hearing events included the petitioner telling the victim he didn't shoot him (in Arabic) and some few days later the petitioner came to the hospital and said "forgive me" and the petitioner promised to pay the doctor and hospital bills (Tr. 227). The victim denied having anything to do with the P.L.O. and further denied attempting to sell tickets to a P.L.O. event (or banquet) to the petitioner. Finally the victim agrees that he has, on file, a substantial civil law suit regarding th events involving this shooting (Tr. 249-50).

FOR THE DEFENSE

Saha Salsh testifies that on the date in question he was living above the tavern. On the night in question he was in the tavern, drinking beer and at no time did he see a gun in the hand of the petitioner (Tr. 267). He would go into the tavern from time to time to watch the go-go dancers (Tr. 277). This witness is no friend of the petitioner (Tr. 279-80).

The petitioner testified that he was the manager of the saloon on June 13, 1974 (Tr. 313). That the victim had attempted to sell him certain tickets to PLO events and

that on the night in question he owed the victim $10 for one of the tickets (Tr. 303-5). He did not call or invite the victim to the tavern. He did not see the shooting and he did not have a gun in the tavern and he did not shoot the victim; when he saw the victim he called the police (Tr. 307-10). The thrust of the cross-examination of the petitioner relates to weapons. The petitioner denies ever having a gun (Tr. 322-23). The petitioner denies he ever asked the victim for any help. The victim was attempting to sell tickets or ads for the PLO (Tr. 328). He did hear the victim say help me and the petitioner called the police (Tr. 332-33).

After the petitioner was arrested he visited the victim at the hospital (Tr. 345). The petitioner denies offering to pay any medical bills but agrees that he did tell the victim that he would take care of the victim's children because he felt sorry for the victim and the petitioner was able to take care of the children (Tr. 346). During the hospital visit THE VICTIM DID NOT TELL THE PETITIONER THAT HE (THE PETITIONER) HAD SHOT THE VICTIM (Tr. 378-79).[11]

The evidence ended. The Court reviewed the proposed instructions and declined to instruct on "inconsistent statements" and *further restricted, in limine, the defense from arguing impeachment of Ms. Watson from the joint police statement and answers of Ms. Green* (Tr. 400-407).[12]

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[11] The PLO banquet ticket that the petitioner said the victim was selling is entered into evidence as defense Exhibit #2 (Tr. 385).

[12] The "joint police statement" of Ms. Green and Watson is appended as Appendix D, *infra*. The closing argument aspect of this petition is presented in question 2, *infra*, pp. 27-29.

THE STATE'S CLOSING ARGUMENT

In part, some of the overwhelmingly prejudicial comments made by the prosecution during their closing argument included the following:

> Subsequently you heard testimony that a man did or somebody did come from outside and shout cab. And what happened, then? Once this blond woman knew that a cab was outside, despite the fact it wasn't called for her—
>
> Mr. Moore: Objection. There is no testimony to that effect.
>
> The Court: Sustained. (Tr. 427)
>
> • • •
>
> So there were two people who were about to leave. Mr. Alarshi, the man with the now frayed ego, but a gun in his hand, saw what happened to be the blond going out the door in the company of either Mr. Demello or the two young gentlemen who testified before you that said they came in the tavern. They saw Mr. Alarshi admit their—
>
> Mr. Moore: Objection to that, your Honor. That was not the testimony. Absolutely not.
>
> The Court: Objection sustained. (Tr. 428)
>
> • • •
>
> But you heard them say that the man behind the bar said to them get out of here and get out fast. Now, why did he say that? We don't completely know whether he had said that because he thought the young men were going to become involved with the blond or there was somebody else. He knew he was going to

> do a—he didn't want anybody in the tavern. He didn't want any witnesses.
>
> Mr. Franklin: Your Honor, I object to that. There is no statement. There was never a clear statement. That was the only testimony Counsel recalls.
>
> The Court: Objection sustained. (Tr. 429)
>
> • • •
>
> And we submit to you that if you think otherwise, then we're in big trouble. So we ask you to consider that if the law is not enforced in this case, what do we have? We have a break down. We have a failure. We have a system which doesn't enforce the laws.
>
> Mr. Moore: Objection to the reference of other cases or the system, in general.
>
> The decision here relates to this case and this case only.
>
> The Court: That objection will be sustained. (Tr. 442)
>
> • • •
>
> Defense Exhibit No. 2 will go with you to the jury room. It's unimportant. It means nothing. The PLO means nothing. Ahmed Ben Alarshi, an Arab is on trial.
>
> Now, you have heard from Mr. Franklin, from an impossible and unbiased defense witness Mr. Salah. Well, I don't think, ladies and gentlemen, if he's impartial and unbiased, I don't believe it. A man is a security guard. He's gotten there at precisely 11:30. And he's also an Arab. He's been to the Cafe Bombay. Perhaps the gun is up in his room right next door to the Three Star Hellenic Cafe.

Mr. Moore: Objection.

The Court: Sustained. (Tr. 471)[13]

During the jury deliberation the trial judge received a written note requesting the joint statement of Ms. Watson and Ms. Green as given, on the night of the event, to the Chicago police investigator, Phelan (Tr. 501-2). The defense took the position that since the jury requested it . . . "that they have it" (Tr. 503). The trial judge declines to give the trial jury the statement (Tr. 504-6).[14]

---

[13] The gun was not recovered. The prosecution is now accusing a defense witness . . . absent a shred of evidence . . . of "perhaps" possessing the weapon used in the shooting (Tr. 471). To reproduce the entirety of the "improper" closing argument by the prosecution would require this petitioner to exceed ordinary length. It may well be that in this Court's discretion a brief in support of this petition will further delineate the prosecution transgressions.

Defense Ex. #2 was a PLO banquet ticket sold to the petitioner by the victim.

[14] The jury retired to deliberate at 4:28 p.m. on September 21, 1976 (Tr. 500, 506). The note requesting the Statement was sent at 7:30 p.m. and the jury returned their guilty verdict at 9:22 p.m. (Tr. 506, 509).

REASONS FOR GRANTING THE WRIT

QUESTIONS 1 and 1a (combined)

In *Douglas* v. *Alabama,* 380 U.S. 415 (1965) this Court ruled that the confrontation clause of the Sixth Amendment was applicable to the states (*Douglas,* at 418). In *Douglas* this Court reversed a similar state conviction (assault with intent to commit murder) because the prosecution was allowed to read to the trial jury the confession of an alleged eye-witness who, when called to testify, invoked a testimonial privilege (380 U.S. 419-420). In *Douglas* an eye-witness, already convicted, was *Loyd. Loyd* had given a statement that *Douglas* fired the shotgun in that particular case and the statement constituted direct evidence against *Douglas* (id. at 419, 420). When called as a trial witness Loyd refused to testify and the prosecutor read Loyd's statement to the trial jury (id., 418-20). This Court reversed the *Douglas* conviction and sentence. Mr. Justice Stewart concurring, put the proposition of law in a constitutional frame as follows:

> The Court says that what happened in this case violated the petitioner's "*rights under the Confrontation Clause of the Sixth Amendment as applied to the States.*" I concur in the Court's judgment, because I think the petitioner was deprived of his liberty without due process of law in violation of the Fourteenth Amendment. This difference in view is, of course, far more than a matter of mere semantics. See my opinion concurring in the result in *Pointer* v. *Tevas,* 380 U.S., p. 409. (380 U.S. at 423)

Petitioner, in this case, was convicted . . . at least in part, by virtue of the trial jury having the benefit of the unsworn statement of a non-trial eye-witness. That non-trial, eye-witness told the trial jury . . . through the lips of the prosecutor . . . that the petitioner pulled out a gun (object) and, shot the victim. Further, the trial jury was also told by this non-trial witness that after the shooting the petitioner ran out of the bar "and fired some shots outside" (Cf., Statement of Case, pp. 3-10, *infra*).[15]

In 1968 this Court ruled that *Bruton* was entitled to a new trial based on the admission of his non-testifying co-defendant's confession . . . where that confession implicated *Bruton* during their joint jury trial. In pertinent part, while reversing, this Court put the case in the context of constitutional terms, stating:

> Before discussing this, we pause to observe that in *Pointer* v. *State of Texas,* 380 U.S. 400, we confirmed "that the right of cross-examination is included in the right of an accused in a criminal case to *confront the witnesses against him*" secured by the Sixth Amendment, id., at 404, 85 S.Ct., at 1068; "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." Id., at 406-407, 85 S.Ct., at 1069.
>
> We applied *Pointer* in *Douglas* v. *State of Alabama,* 380 U.S. 415, in circumstances analogous to those in the present case. There two persons, Loyd and Douglas, accused of assault with intent to murder, were tried separately. Loyd was tried first and found guilty. At Douglas' trial the State called Loyd as a witness against him. An appeal was pending from

[15] The trial record makes precious little reference as to why Ms. Cathy Green (the non-trial-eye-witness) was not available for trial.

Loyd's conviction and Loyd invoked the privilege against self-incrimination and refused to answer any questions. The prosecution was permitted to treat Loyd as a hostile witness. Under the guise of refreshing Loyd's recollection the prosecutor questioned Loyd by asking him to confirm or deny statements read by the prosecutor from a document purported to be Loyd's confession. These statements inculpated Douglas in the crime. We held that Douglas' inability to cross-examine Loyd denied Douglas "*the right of cross-examination secured by the Confrontation Clause.*" 380 U.S., at 419, 85 S.Ct., at 1077. We noted that "*effective confrontation* of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer." Id., at 420, 85 S.Ct., at 1077. The risk of prejudice in petitioner's case was even more serious than in *Douglas.* In *Douglas* we said, "Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true." Id., at 419, 85 S.Ct., at 1077. Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly before the jury during its deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true—not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not

take the stand. Petitioner thus was denied his constitutional right of confrontation. (391 U.S. at 126-128).[16]

California v. *Green,* 399 U.S. 149 (1970) is not to the contrary *albeit* this Court found no confrontation problem while vacating the State Court finding in favor of *Green.* In *California* v. *Green,* this Court held that where the declarant (in a non-jury trial) was available for confrontation and cross-examination both at a preliminary hearing and at the later bench trial, then the use of the preliminary hearing testimony of the declarant was not violative of the Sixth Amendment. This Court, while finding no Sixth Amendment violation put the proposition as follows:

> Finally, we note that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation—*situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial.* These situations have arisen through application of a number of traditional "exceptions" to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant usually on the theory that the evidence possesses other indicia of "reliability" and is incapable of being admitted, despite good-faith efforts of the State, in any way that will secure—confrontation with

[16] In *Bruton* there was a strong "limiting" instruction. This Court found that the limiting instruction was not acceptable or adequate substitute for *Bruton's* right of "cross-examination" (391 U.S. at 137). Mr. Justice Stewart concurring. In the case at bar the sole offered limiting instruction was not given to the jury (Tr. 400-07; App. C, *infra*).

> the declarant. (399 U.S. at 161, 162; emphasis supplied; ft.nt. omtd.)[17]

Next came *Dutton.* In *Dutton* v. *Evans,* 400 U.S. 74 (1970) this Court reversed the granting of habeas relief where the question before the Court related to the testimony of an inmate (Shaw) as to what an accomplice to the *Evans'* murder had said to Shaw about *Evans* (400 U.S. at 77-79). In this Court the question became, *inter alia,* one of the right to confrontation *albeit,* there was no question that Shaw (the declarant) was both a trial witness and the subject of vigorous and complete cross-examination.[18]

Chambers v. *Mississippi,* 410 U.S. 284 (1973) provides additional insight into "confrontation and cross-examination". In *Chambers* McDonald had confessed to the murder for which *Chambers* had been tried and convicted. McDonald was called as a trial witness and admitted his earlier confession. The prosecution cross-examined and

[17] In *Green* the trial was without a jury and therefore the concept of limiting instructions was obviated.

[18] At 400 U.S. 87 n. 18, this Court notes that the cross-examination of Shaw was such as to cast serious doubt on Shaw's credibility. Williams was the co-indictee of *Evans* and his alleged conversation with Shaw was the subject of the decision in *Dutton* v. *Evans, ante,* (Cf., dissenting opinions of Justices Marshall, Black, Douglas and Brennan . . . 400 U.S. 100-111). The dissenting Justices opted for a new trial under the principles of both *Douglas* v. *Alabama,* and *Pointer* v. *Texas,* (400 U.S. at 102-111). THERE CAN BE LITTLE QUESTION THAT THE *BRUTON* DOCTRINE IS APPLICABLE TO THE STATES AND THUS TO THE QUESTIONS POSED IN THE INSTANT PETITION, *Roberts* v. *Russell,* 392 U.S. 293 (1968).

McDonald repudiated his earlier confession (id. at 291). *Chambers* attempted to proffer three (3) trial witnesses who would have testified as to McDonald's original confession and the circumstances under which it was given (id. at 292, 293). This Court reversed the conviction finding *inter alia*:

> Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. He was not allowed to test the witness' recollection, to probe into the details of his alibi, or to "sift" his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief. *Mattox* v. *United States,* 156 U.S. 237, 242-243 (1895). *The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process."* *Dutton* v. *Evans,* 400 U.S. 74, 89 (1970); *Bruton* v. *United States,* 391 U.S. 123. *It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."* *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965). (410 U.S. at 295)

The Circuits are certainly not in accord. In *U.S.* v. *West,* 574 F.2d 1131 (4th Cir., 1978) the Court affirmed a federal narcotic conviction finding that the use of prior sworn grand jury testimony did not offend either the Sixth Amendment or Rule 804(b)(5) of the Fed.R.Evid. The grand jury testimony that was introduced as evidence was that of a slain prosecution witness.

Circuit Judge Widener dissented. In part, Judge Widener's vigorous dissent urged the following:

> I raise again the objections I voiced in the dissent in *United States* v. *Payne,* 492 F.2d 449 (4th Cir. 1974).

Here, as in that decision, the majority has confused the issues of the admissibility of hearsay and the right of a criminal defendant to be confronted by his accusers. While the two different rules of law may "stem from the same roots," they are by no means identical, but are closely akin. *Dutton* v. *Evans,* 400 U.S. 74, at p. 86, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

The majority's treatment of the confrontation clause again, as in *Payne*, reduces the constitutional provision to the status of a mere rule of evidence when, in fact, the clause was intended to regulate the procedure of a criminal trial by compelling the presence of the accuser before the jury and the defendant. The court concludes that because the grand jury testimony is reliable, the confrontation clause is not violated; that because the circumstances surrounding the testimony, including the corroboration of Brown's assertions by the federal agents, indicate that Brown may well have been truthful, the jury could assess his veracity in his absence. At root, then, of the majority's analysis is its conclusion that Brown indeed spoke the truth, that his testimony was reliable, being corroborated, and that, the jury having been presented with sufficient indications of Brown's sincerity, the defendant's right of confrontation was not abridged.

This analysis is, however, misplaced. While it has been said "the mission of the *Confrontation Clause* is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement,' *California* v. *Greene,*" *Dutton* v. *Evans,* 400 U.S. at p. 89, 91 S.Ct. at p. 220, the whole question is not, as the majority treats it, whether the testimony is in fact truthful; rather, the issue is whether there has been such "*adequate 'confrontation'*" *as to satisfy*

the requirements of the Constitution's Sixth Amendment. Dutton, 400 U.S. at p. 97, 91 S.Ct. 210 (Harlan, J., concurring). Hence, we should not be lured by the possible reliability of out-of-court statements, important as that is in the consideration of the problem as a rule of evidence, away from the ultimate constitutional prescription, which is the regulation of trial procedure.

• • •

1. The opinion refers to the consideration of admission under *Federal Rule of Evidence 803(24)* which is identical in text to *804(b)(5)* upon which rests the majority's decision to allow the admission of the hearsay grand jury testimony into evidence. I see no difference of moment here in the equivalent guarantees of trustworthiness under the two rules just cited.

2. "It seems apparent that the *Sixth Amendment's Confrontation Clause* and the evidentiary hearsay rule stem from the same roots. But this court has never equated the two, and we decline to do so now." *Dutton,* at p. 86, 91 S.Ct. at p. 218 (footnotes omitted).

3. The majority follows the path of the plurality opinion in *Dutton* which also looked to indicia of reliability rather than whether the defendant had been confronted. (574 F.2d 1131 at 1139)

In an earlier case from the same Circuit, *U.S.* v. *Morlang,* 531 F.2d 183 (4th Cir., 1975) the Court reversed certain federal bribery convictions finding prejudicial error in the use of earlier grand jury testimony being read to a government witness, under the guise of refreshing that witness' recollection (id. at 190-191). As to that simple issue (using the witness' grand jury testimony to allegedly impeach the witness) the *Morlang* Court stated:

> A contrary holding would permit a party to substitute the prior statement of a witness for his actual testimony. The Supreme Court has considered a similar fact situation and, while holding that the grand jury testimony was used simply to refresh the recollection of the witness, stated ". . . there would be error where under the pretext of refreshing a witness' recollection the prior testimony was introduced as evidence." *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 84 L.Ed. 1129 (1940). (531 F.2d at 191)

Of greater import in the *Morlang* decision is a situation where the prosecution called a witness for the sole purpose of denying he had any conversations with a prison inmate; said conversations implicating *Morlang.* Thereafter the government called the inmate. That inmate was then permitted to testify that he had a conversation with the first witness and, further, that the conversation involved *Morlang.* The Court found prejudicial error in the government shenanigans (allowing the inmate to testify as to the conversation with the first witness under the guise of impeaching the testimony of the first witness (id. at 189-190). Ultimately, the Court, while finding prejudicial error, stated:

> Witnesses may, of course, sometimes fail to come up to the expectations of counsel and in such situations there is an understandable temptation to get before the jury any prior statement made by the witness. And it may be that in certain instances impeachment might somehow enhance the truth-finding process. Yet, whatever validity this latter assertion may have, it must be balanced against the notions of fairness upon which our system is based. ***Foremost among these concepts is the principle that men should not be allowed to be convicted on the basis of unsworn testi-***

mony. Bridges v. *Wixon,* 326 U.S. 135, 153-54, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945). (531 F.2d at 190)[19]

In *Phillips* v. *Wyrick,* 558 F.2d 489 (8th Cir., 1977) the Court affirmed the denial of habeas relief where the habeas petition claimed a deprivation of the constitutional right of confrontation (id. at 492). In *Phillips* a prosecutor was allowed to testify, at trial, as to what an earlier prosecution witness testified to at a preliminary hearing. During the *Phillips* trial this same witness invoked his testimonial privilege. The prosecution then called an assistant prosecutor who testified as to the substance of the prosecution's witness testimony at an earlier preliminary hearing . . . where *Phillips* was represented by counsel and had the plenary opportunity for both confrontation and cross-examination (id. at 492-494). The Court, while affirming habeas relief took the position that the earlier opportunity to conduct a full and complete cross-examination of the witness accorded the confrontation requirement and therefore there was no error in allowing the prosecutor to now testify as to the substance of the preliminary hearing testimony against *Phillips* (558 F.2d at 496-97). However, while affirming, the Court used the following *caveat*:

> *Our conclusion might differ were there any indication in the record that the written statement attributed to Brownfield had been read to the jury or otherwise admitted into evidence.* Such an occurrence would call for a careful analysis of whether the jury could adequately weigh the credibility of the extrajudicial statement, *whether it was crucial to the government's case, and whether its use before the jury was limited*

[19] In *Morlang,* Circuit Court Judge Butzner dissented (531 F.2d 192-193).

> *by the trial judge.* (558 F.2d at 497; emphasis supplied)[20]

The "sub" question presented is the lack of any limiting instruction. The single requested instruction has been reproduced as Appendix C, *infra.* While the proffered instruction is hardly a model of clarity, nevertheless, it could have provided some insight to the trial jury as to the manner or method by which the testimony of Ms. Watson (and the testimony of the non-witness Cathy Green) could or should be viewed (impeachment vs. substantive evidence against the present petitioner). In *Benson* v. *U.S.,* 402 Fed.2d 576 (9th Cir., 1968) the Court reversed a federal narcotic conviction finding, *inter alia,* that the failure to properly instruct a trial jury as to the weight given an

[20] The petition at bar (that is the trial record) clearly reveals that the *written statement* attributed to Ms. Cathy Green (the non-appearing but testifying eye-witness) was read to the jury. Further, the *Green* statement was crucial to the prosecution's case. Further, the weight of this statement (impeachment vs. substantive evidence against petitioner) was in *no wise limited* during the court's charge to the jury, or otherwise. The joint statement of Ms. Watson and Ms. Green appears in the trial record at R. 15 and is reproduced as Appendix D of this petition.

The *Phillips'* decision would seemingly compel reversal of the conviction presently challenged in this petition based on the following verbiage from *Phillips*:

> If in fact it constituted the unsworn extrajudicial statement of an alleged accomplice, inadequately tested by cross-examination and failing to bear sufficient indicia of reliability to have been placed before the jury in a nonprejudicial manner, then such evidence might indeed be found to have posed a substantial threat to petitioner's right to confront the witnesses against him. *See Dutton* v. *Evans, supra; Bruton* v. *United States,* 391 U.S. 123; *Brookhart* v. *Janis, supra; Douglas* v. *Alabama,* 380 U.S. 415. (558 F.2d at 497)

inconsistent statement led to prejudicial error where the Statement (written) was identified, described and offered into evidence by the prosecution. The Court in *Benson* found that based on the prosecution's use of the prior inconsistent statement . . . the failure to give a limiting instruction, *sua sponte,* was plain and prejudicial error (402 F.2d at 581-582). In *U.S.* v. *Gregory,* 472 F.2d 484 (5th Cir., 1973) the Court reversed a federal second degree murder conviction finding, *inter alia,* that after improper impeachment the failure of the trial court to instruct the jury that the impeaching statements could not be used as *affirmative* evidence was prejudicial error; this, notwithstanding a failure by the defense to request such an instruction (472 F.2d at 489).[21]

We respectfully suggest that under combined questions 1 and 1(a) this petition has presented a substantial constitutional confrontation question. We deem it most inappropriate to consider that this Court will condone a state conviction and prison sentence where the prosecution was allowed to present evidence of an unsworn unseen eye-witness through the lips of the prosecuting attorney under the guise of rehabilitating another eye-witness to the shooting. We further suggest that this evidence was crucial to the prosecution in that there were but two (2) live prosecution eye-witnesses and the petitioner, and others, testified that the petitioner did not commit the offense for which he was tried, convicted and sentenced.[22]

---

[21] In poor taste we retreat to respectfully remind this Court that in *Bridges* v. *Wixon,* 326 U.S. 135 (1945) this Court condemned the use of impeachment evidence as proof for the substantive offense (Cf., 326 U.S. 153, citing additional authorities).

[22] The petitioner received a prison sentence, but the execution of the sentence was stayed by a justice of the Illinois Appellate Court pending disposition of this petition (Appendix E, *infra*).

QUESTION 2

After the close of the evidence and during the conference on instructions a question was raised as to restricting the right of the petitioner to argue the impeachment aspect of the *Watson-Green* statement. In pertinent part, the colloquy is as follows:

> Mr. Franklin: [Defense Counsel] Your Honor, I hope that I'm not going to be restricted from arguing that in front of this jury, because it's—
>
> The Court: Well, you certainly will be restricted from arguing impeachment of Watson made by statements of Green, that's the whole thrust of the dilemma in this case.
>
> As I indicated in the record, I felt it was not dealing in candor with the Court or with the jury to question Watson on statements that were made by Green, in the statement from which you read.
>
> Mr. Franklin: Does that mean that I'm going to be denied the right to mention that statement?
>
> The Court: You can mention the statement and you can mention the fact that she stated at the bottom that she read the statement by Green. But you won't purport to make Green's statement her statement as you did or as your co-counsel did on the direct presentation of this matter.
>
> Mr. Franklin: Your Honor, I'm going to object to that, because it's our understanding and it was our belief from the very beginning that that statement incorporated both statements of the defendant. And they were both questioned together. And it represented the total sum of their knowledge of that incident. That's why they were questioned together and they both signed it. And I feel that by not allowing me to argue that, you're restricting the defense of my client by not giving me an opportunity to show—
> (Tr. 403, 4)

In *Herring* v. *New York*, 422 U.S. 853 (1975) this Court reversed an attempt robbery conviction finding that a New York statute limiting the right of defense counsel to *no* closing argument in a bench trial was a denial of the Sixth Amendment right to the assistance of counsel. Clearly, "the assistance of counsel" concept of the Sixth Amendment is applicable to the case at bar (Cf., *Herring*, 422 U.S. 857, n. 7). Can there be any difference (realistically speaking) to on the one hand, deny to the defense any closing argument and, on the other hand, deny defense counsel the right to argue what is realistically the *sine qua non* of the particular case? We suggest that there is no realistic difference and that the petitioner at bar was denied the "assistance of counsel" by virtue of the trial court's ruling denying defense counsel the opportunity to argue the impeachment of Ms. Watson by virtue of the joint statement read to the trial jury by the prosecution. In reality, as in *Herring*, a distinction absent a difference.

The prosecution, not content with the defense being precluded from arguing the "heart" of their defense case, went on to urge the trial jury to convict suggesting "facts" not in evidence.[23] In *Taylor* v. *Kentucky*, ... U.S. ....., 98 S.Ct. 1930 (1978) this Court reversed *Taylor's* robbery conviction finding that the combination of the failure of the trial court to instruct on the "presumption of innocence" and the prosecutor's improper closing argument combined to deny *Taylor* a constitutionally protected trial. In *Taylor* the Court reversed the conviction based on the trial court's refusal to give an instruction on "presumption of innocence" and in denying the instruction *Taylor*

[23] For example, the prosecution urged that it was likely that the missing gun was in the apartment of a defense witness . . . *albeit* there was hardly a shred of evidence to suggest such a "fact" (Tr. 471).

was denied a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment (98 S.Ct. at 1937). However, the *Taylor* opinion did make reference to the prejudicial closing argument by the State prosecutor (98 S.Ct. at 1935-36). This Court further opined that the prosecutorial comments, standing alone, might not rise to the level of reversible error . . . AN ISSUE NOT RAISED IN THIS [*TAYLOR*] CASE (98 S.Ct. 1936, n. 14).

Petitioner at bar squarely raises the question(s). Did the combination of a grossly improper closing argument by the prosecution coupled with the "express limitation" place on the defense closing argument combined to deny the petitioner at bar his due process protections as per the Fourteenth Amendment? All this, in connection with the question posed in 1 and 1a of this Petition rise to the level of constitutional dimension.

CONCLUSION

Ahmed Ben Alarshi, petitioner herein, respectfully prays that this Court grant his petition for writ of certiorari to the Appellate Court of Illinois and thereafter vacate and remand the case at bar to the Illinois Courts for trial anew.

Respectfully submitted,

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APPENDIX

APPENDIX A

FIRST DIVISION

February 6, 1973

76-1471

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

AHMED BEN ALARSHI,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County; the Hon. RICHARD CURRY, Judge, presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

After a jury trial, Ahmed Ben Alarshi (defendant) was found guilty on two counts of aggravated battery (Ill. Rev. Stat. 1973, ch. 38, par. 12-4), and sentenced to 1 to 3 years. On appeal he contends only that the court erred in refusing to instruct the jury regarding prior inconsistent statements and that this error was compounded when the court prohibited the defense counsel from commenting upon these inconsistencies in closing argument.

The victim, Freddi Demellow, was shot in a tavern, in Chicago, shortly after midnight on June 13, 1974. Jean Watson testified she and Kathy Green were working as dancers in the tavern. The defendant, owner of the tavern, was tending bar. He engaged in heated conversation with a blond woman at the portion of the bar farthest from the

front door. At about 11 p.m., the victim entered the tavern and sat at the bar near the door. Shortly after midnight, the victim walked to the back of the tavern and made a telephone call. As he walked down the length of the bar to return to his seat, the witness saw the deefndant warn two customers who had just entered the tavern to "leave quick." At the same time the blond woman walked past the victim toward the front door. The witness heard a shot, saw the victim fall near the bar, and saw the defendant holding a gun "straight out." The defendant then quickly walked to the rear of the tavern with the gun and returned empty-handed. The witness also testified she heard another shot some 10 minutes before, which was followed by a remark made by the defendant to the blond woman concerning the Fourth of July. The witness ran to her dressing room following the second shot.

On cross-examination it was revealed that, in addition to her testimony at the preliminary hearing, the witness, Jean Watson, gave the police a statement subsequent to the incident. This statement, to be more fully discussed below, was a joint written statement given by Jean Watson and Kathy Green. The preliminary testimony and the joint statement both attributed the shooting of the victim to the defendant.

Miss Watson's account of events was substantially duplicated by the victim, Freddi Demellow, who also testified for the State. He added that when the defendant served him a drink after he arrived at the tavern, the defendant motioned toward the blond woman at the far end of the bar and said he had to "settle an account" with her. The victim saw the defendant return from the back of the tavern with a gun and fire it into the air as he asked of the blond woman, "Haven't you heard of the 4th [sic] of July?"

The victim stated the defendant then placed the gun underneath the bar. The victim also testified that the defendant, "had the gun in his hands and fired the bullet" which wounded him. As he lay on the floor the defendant leaned over and requested him not to tell the police who shot him. The victim also testified that, three days later, the defendant visited him in the hospital, asked to be forgiven and offered to take care of the victim's children.

A police officer testifying for the State spoke with the victim for a few moments after the shooting. The victim indicated at that time he knew the identity of the assailant although he did not provide the officer with any name.

The defendant testified in his own behalf. He denied shooting Freddi Demellow or ever possessing a gun and stated he did not know who shot the victim. On cross-examination the defendant acknowledged visiting the victim in the hospital three days after the incident but denied asking forgiveness for his actions. He stated he merely expressed his sympathy and offered to watch the victim's children because he felt sorry for him.

Defendant contends only that the court erred by not providing the jury with an instruction regarding prior inconsistent statements. (Illinois Pattern Jury Instructions, Criminal, No. 3.11 (1968) (hereinafter cited as IPI Criminal No. 3.11).) It is defendant's position that this instruction was necessary in view of the inconsistencies between the trial testimony and both the preliminary hearing testimony of Jean Watson and the joint statement she and Kathy Green gave the police.

As the preliminary hearing Jean Watson testified she was unable to recall the number of shots fired. She also did not mention the earlier shot or defendant's remark con-

cerning the Fourth of July. Defendant contends that this prior testimony directly contradicted Jean Watson's testimony at trial, wherein she specifically remembered two shots and defendant's remark which followed the earlier shot. We are unable to agree with defendant's position that these inconsistencies constitute material discrepancies impeaching the witness. Although out-of-court written or oral statements may be introduced to discredit a witness (*Hapke* v. *Brandon* (1951), 343 Ill. App. 524, 528, 99 N.E. 2d 636), these statements "must have the 'reasonable tendency' to discredit the testimony of the witness on a material matter." (*People* v. *Brown* (1972), 6 Ill. App. 3d 500, 504, 285 N.E.2d 515, quoting from *People* v. *Rainford* (1965), 58 Ill. App. 2d 312, 321, 208 N.E.2d 314; see also *Reilly Tar & Chemical Corp.* v. *Lewis* (1942), 326 Ill. App. 84, 87, 61 N.E.2d 290.) Jean Watson's testimony at the preliminary hearing that she was unable to recall the number of shots fired, as well as her omission of defendant's earlier remark and the first shot, are not contradictions of material matters bearing upon the trial issue as to whether defendant fired the shot which struck Freddi Demellow.

The cases cited by defendant are unpersuasive in that they involve prior impeaching statements which directly contradicted the trial testimony of the witness on material elements of the offense charged (*People* v. *Ladas* (1957), 12 Ill. 2d 290, 294, 146 N.E.2d 57; *People* v. *Mitchell* (1975), 27 Ill. App. 3d 117, 121, 327 N.E.2d 158, *leave to appeal denied,* 60 Ill. 2d 599); or revealed omissions in the trial testimony material to the credibility of the witness (*People* v. *Henry* (1970), 47 Ill. 2d 312, 319-20, 265 N.E.2d 876). Furthermore, the trial testimony of Jean Watson was corroborated by the victim, who provided clear and convincing testimony that defendant held the gun and fired the important shot which wounded the victim.

Defendant also claims Jean Watson was impeached during cross-examination by portions of the joint statement

she and Kathy Green gave the police. This joint statement was typed on one sheet of paper. It consisted of questions preceded by "Q." and separate responses by the witnesses preceded by identifying letters "W." and "G." respectively. Each witness signed the statement which included two typed answers "Yes" after each initial responding to the question "Do each of you agree that the account given by the other is accurate?"

During cross-examination of Jean Watson, defense counsel attempted to impeach her by pointing out that according to the typed statement the defendant fired additional shots outside the tavern following the shooting, four people ran out of the tavern, and the defendant telephoned the police. This was actually unfair and improper as these questions all incorrectly attributed to Jean Watson the response actually made by Kathy Green. On redirect examination the State brought out, over objection by defendant, that these parts of the statement were in fact made by Kathy Green, as was indicated on the typed sheet by the letter "G." appearing before this material. Neither defendant nor the State offered this joint statement in evidence. During jury deliberation, the jury sent out a written note which requested a copy of the statement. The trial court consulted with counsel. The court gave the jury a written response that they were "in possession of all the material which is evidence in this case" and that the statement had not been admitted into evidence.

Defendant contends that the statements provided by Kathy Green are completely attributable to Jean Watson in view of the reference by each witness to the other's "account."

In our opinion it was unfair to attempt to attribute the Kathy Green statements to Jean Watson even though Watson had, in a general way, expressed the opinion that the

responses given by Green were "accurate." Furthermore, of dispositive importance is the fact that whether defendant fired additional shots outside, whether four people ran out of the tavern and whether defendant telephoned the police have no materiality here. Therefore, as above shown these statements by Green were not proper as attempted impeachment of Watson's trial testimony. In addition, the allegedly impeaching comments contained in the joint statement and read to the jury do not, in our opinion, contradict or tend to vary the trial testimony of Jean Watson regarding the actual shooting (*People* v. *Miller* (1975), 31 Ill. App. 3d 436, 446, 334 N.E.2d 421). In our opinion, it was not necessary for the trial court to give the jury IPI Criminal No. 3.11. In this situation it was sufficient for the court to give the jury the instruction concerning the credibility of the witnesses. Illinois Pattern Jury Instructions, Criminal, No. 1.02 (1968).

In closing argument, the court restricted defense counsel to description of the joint statement and stating the fact that it showed that Jean Watson read the statements of Kathy Green and signed the statement regarding the accuracy of the responses by Kathy Green. We find no error in this regard as it permitted a full and accurate exposition of the joint statement.

We will also point out the strong and overwhelming evidence of guilt. The testimony of Jean Watson and Freddi Demellow was clear and convincing to establish guilt beyond reasonable doubt. As opposed to this evidence the defendant offered only a categorical denial of guilt. Defendant received a fair trial free from error. The judgment appealed from is affirmed.

Judgment affirmed.

McGLOON and O'CONNOR, JR., JJ., concur.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

May 26, 1978

Mr. Ludwig E. Kolman
Attorney at Law
William J. Harte, Ltd.
111 West Washington St.
Chicago, IL 60602

No. 50603—People State of Illinois, respondent, vs. Ahmed Ben Alarshi, petitioner. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

CLELL L. WOODS
Clerk of the Supreme Court

APPENDIX C

3.11 Impeachment-Prior Inconsistent Statements

Evidence that on some former occasion a witness (made a statement—acted in a manner) inconsistent with his testimony in this case, may be considered by you in deciding the weight to be given to the testimony of that witness.

APPENDIX D

13Jun74

Joint statement of Jean Watson and Kathy Green, relative to the shooting of Fredi Demellow, which occurred on 13 Jun74, at about 12:10 A.M., in the Three Star Hellenic Restaurant, located at 4657 N. Kedzie Avenue.

Statement taken at the 17th District on 13Jun74 at 2:15 P.M.

Questioned and typed by: Inv. James P. Phelan #8911, H/S #5

Q. What are your names, address, and phone numbers?
W. Jean Watson, 1756 W. Nelson, 929-7299.
G. Kathy Green, 1703 W. Barry, 528-6204.
Q. What do you girls do for a living?
W. We are dancers at the Three Star Hellenic Restaurant.
Q. Would you tell me in your own words what happened this evening?
W. We were in the place since about 9:00 o'clock. When we got there, El was tending bar. At the end of the bar, a blond girl about 25 years old, was seated. She is a bar maid there. She has been working there since we started. About 11:00 o'clock, Fredi came in and sat at the bar. He was sitting near the front door, next to me, and Kathy was sitting around the corner of the bar. All evening, El was arguing with the blond, who is the girl friend of the bartender. The arounf (sic) 12:00 o'clock, El and the blond were still arguing. Fredi got up from the bar to go to the phone to call a cab. Then he walked to the front of the place, back to his stool. This is when the blond was walking to the front door. At the same time, two guys were

coming into the place. One of them walked in, and El apparently thought that the blond was leaving with them. El told them that they better get out of there, and fast, and they turned around and walked out. At that time, the girl was starting to go out the door, and El reached under the bar.

Q. What happened then?
G. El reached under the bar, and I saw him reach out with an object in his hand, and I heard a loud noise, and saw Fredi fall down to the floor. El then ran out of the bar, to the front door. He stepped out and fired some shots outside. There were about four other people in the place who ran out. Then El ran to a back room, walked in, returned from the room, and called the police.
Q. In this statement, you refer to a man as El. Is he the same man who is in the station this morning?
W. Yes.
Q. Each of you have responded to a part of this statement. Do each of you agree that the account given by the other is accurate?
W. Yes
G. Yes
Q. Is there anything that you want to add to this statement?
W. ~~Yes~~. *No. JPP* *Kathy Green*
G. ~~Yes~~. *No JPP* *Jean Watson*

APPENDIX E

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

AHMED BEN ALARSHI,
Defendant-Appellant.

NO. 76-1471

ORDER
(Filed July 17, 1978)

This cause coming to be heard on motion of the defendant-appellant, AHMED BEN ALARSHI, due notice having been given and the court being fully advised in the premises and having jurisdiction over the parties and subject matter;

IT IS HEREBY ORDERED:

In consideration of the motion and affidavit filed on behalf of defendant-appellant, Ahmed Ben Alarshi, it is hereby ordered that this Court's mandate be stayed pending the filing and disposition of the petition for writ of certiorari to the United States Supreme Court in the above-captioned case.

/s/ *Mayer Goldberg*
Justice